91-1514

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, ET AL.,

Appellants,

v.

THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

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March, 1992

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QUESTIONS PRESENTED

1. [Absent] a judicial or administrative finding of racial [discrimination] or previous [disadvantage] in the electorial process and on a record devoid of any such finding or allegation of racial discrimination or disadvantage in the electorial process, does either the Constitution, Section two of the Voting Rights Act, or this Court's decision in Karcher v. Daggett, 462 U.S. 725 (1983) permit, as the divided court below held, a State Legislature to take [affirmative action] in its redistricting process, resulting in the removal of an incumbent white congressman from his present majority black populated district, creating a new safe district for that Congressman and creating an open super majority-minority district through racial

classification of voters [to ensure or to guarantee] the election of a black congressional candidate?

2. Was the divided court below clearly erroneous in holding that this courts decision in White v. Weiser, 412 U.S. 783 (1972) or Karcher vs. Daggett, permit a state legislature to "... give Congressman Hoyer, a congressman with high ranking and importance in the Federal House of Representatives, a "safe seat" to provide the majority black population ... with a chance to chose a representative without requiring that person to run against a strong incumbent such as Congressman Hoyer..." when neither of these cases held that the re-election of incumbents, based on seniority, is a legitimate state goal in congressional redistricting?

3. Are Congressional Representatives [chosen by the people], as required by Article I Section 2 of the Constitution when a State Legislature geographically manipulates people, and classifies voters according to party registration, race, and past voting preference to dictate the outcome of future Congressional elections?

4. Does this court's bedrock mandates in Wesberry v. Sanders, 376 U.S. 1 (1964), Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964) that a State may not debase or dilute an individuals vote, that fair and effective representation is the admitted goal of redistricting and that full and effective participation requires that each citizen have an [equally effective voice] in the election process, recognize a principle that just as

unequal population dilutes an individuals vote, malapportionment through classification of voters dilutes their right to effectively participate in an election?

THE PARTIES

Appellants in this proceeding are Anne Arundel County Republican Central Committee, Laura Green-Treffer, Anne Arundel County Democratic Central Committee, Kimberly Ann McCoy, Roger W. Moyer, Robert C. Schaeffer and E. Libby Ramsbottom.

Appellees in this proceedings are The State Administrative Board of Election Laws, Winfield M. Kelly, Jr., Secretary of State, and Board of Supervisors of Election of Anne Arundel County.

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CENTRAL COMMITTEE, et al.,

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OF ELECTION LAWS, et al.,

Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MARYLAND

JURISDICTIONAL STATEMENT

In compliance with Rule 18.1, 18.3, and 33 of this Court, Appellants submit this statement particularly disclosing

the basis upon which this Court has jurisdiction on appeal to review the judgment and decision of the United States District Court for the District of Maryland, sitting as a three judge court, entered on December 23, 1991, which declared constitutional legislation enacted by the Maryland General Assembly on October 23, 1991 to redistrict the State of Maryland's eight congressional districts pursuant to the 1990 Census.

OPINIONS BELOW

The reported opinion of a divided three judge court below is set out in Appendix A. District Judges Smalkin and Kaufman comprising the majority and Fourth Circuit Court of Appeals Judge Niemeyer dissenting.

JURISDICTION

This action was initially brought by Appellants Anne Arundel County

Republican Central Committee, Anne Arundel County Democratic Central Committee, political groups, and by, Green-Treffer, McCoy, Moyer, Schaeffer, and Ramsbottom, individual Appellants, challenging the 1991 Maryland General Assembly Reapportionment Act, H.B. 10, under Article I, Section 2 of the Constitution of the United States, under the Fourteenth Amendment to the Constitution of the United States, and under 42 U.S.C. section 1983. Jurisdiction in the court below is based on 28 U.S.C. SS 2284(a), 1331, 1343(3)(4), and 42 U.S.C. section 1983, and venue pursuant to 28 U.S.C. section 1391(b). A three judge panel was appointed pursuant to 28 U.S.C. section 2284. By agreement of both parties, the three judge panel heard arguments in open court on December 13, 1991. The court considered, without objection,

depositions, affidavits, stipulated facts, maps and Census data. On December 23, 1991, a divided three judge court entered its opinion and order. (App. A) A notice of appeal (App. B) was filed in the United States District Court for the District of Maryland on January 21, 1991, its timeliness and the timeliness of this statement being governed by Rule 18.1 and 18.3 of the Rules of this Court.

Jurisdiction of this Appeal is conferred on this Court by 28 U.S.C. section 1253, since the order appealed from involved a judgment rendered by a three judge court.

STATUTES INVOLVED

Article I, Section 2 of the Constitution of the United States provides as follows:

The House of Representatives shall be composed of members chosen every second

year by the people of the several states.

Voting Rights Act of 1965, Section 2 as amended, 42 U.S.C. section 1973(a)(b) provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. section 1973(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or

political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. To the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. section 1983 states:

Every person who under color of any statute, ordinance, regulation, custom or usage, of any state or territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On September 25, 1991, a special session of the Maryland General Assembly was convened at the request of the Governor of the State of Maryland, for the purpose of considering and passing Congressional redistricting legislation. The difference in the proposals fostered by the leaders of the Senate and the House of Delegates led to a highly publicized and rancorous dispute. The divisions between the leaders resulted in the proceedings being described by the General Assembly's [own] members as "a zoo", "purely political", "an exercise in self-protection and political greed". Voting sessions and political maneuvering contemptuous of both a fair electoral process and state law resulted in an [unconstitutional]

recess declared by the Speaker of the House of Delegates. Thereafter, the Attorney General of the State of Maryland issued an opinion critical of the Speaker's action and the legislature was reconvened. On October 10, 1991, a joint House/Senate Conference Committee was appointed to resolve the deadlock. On October 18, 1991, after further political infighting, the Speaker again [threatened] to adjourn the House and allow the federal courts to resolve the deadlock.

During the final weekend of the special session of the General Assembly, the Conference Committee met and drafted a redistricting plan known as H.B. 10. While four other plans existed, each with equal or less population variance, and [did not] cause incumbent U.S. Representatives to run against one another, H.B. 10 was the only plan

presented to the General Assembly on October 21, 1991, the last day of the special session. At that time, it was described to members of the Senate by that body's President as "not a good deal but a deal" and it was better that they adopt a plan rather than "let a non-elected federal judge, a non-political person draw a map for us;" to which an unidentified voice cried out from the floor of the Senate: "God help us." Another Senator alleged that the federal courts were not only waiting for the case but that they (the Senators) knew who the judges were that would hear the case. After another rancorous session, the Senate approved H.B. 10 and sent it to the House of Delegates which also approved it. H.B. 10 divided Anne Arundel County, which had previously comprised one congressional district, and its residents and political groups,

into segments of four congressional districts, none of which approach a majority voter population in any district. Under the plan, 239,617 County residents residing on the Western Shore of the Chesapeake Bay, were placed in the Eastern Shore's First Congressional District and joined to their majority population only by a single four mile long bridge. 45,283 County residents were placed in the Second Congressional District also completely separated from the majority by water, so that access requires passage through two other congressional districts. 64,081 County residents were placed in the Third Congressional District; and 78,528 were placed in the Fifth Congressional District. All was done for purely political purposes, i.e., the creation of a new super majority minority district and the

protection of senior incumbent congressmen.

Accordingly, on November 12, 1991, Appellants filed suit in the United States District Court for the District of Maryland alleging that the redistricting plan adopted by the General Assembly had a greater population variance between the largest and smallest districts than did alternative plans which received no consideration and that such deviations were not justified, that H.B. 10 deprived Appellants of an opportunity to effectively participate in the political process and that H.B. 10 represented an unconstitutional gerrymander.

On December 13, 1991, the three judge panel heard the case on the merits through oral argument and consideration of exhibits received by the court on that date. Thereafter on December 23,

1991, a divided three judge court filed its opinion and order declaring H.B. 10 constitutional. The majority of the three judge court, District Judges Smalkin and Kaufman held, while population variances could have been avoided, that creating a super-majority minority voting district and recognizing incumbent representation with its attendant seniority in the House of Representatives were both justified as being within the "aim" or "ambit" of the second prong of Karcher v. Daggett, 462 U.S. 725 (1982) and White vs. Weiser, 412 U.S. 783 (1972) and that Appellants did not show any discriminatory vote dilution under Davis v. Bandemer, 478 U.S. 109 (1986).

To the contrary, Fourth Circuit Court of Appeals Judge Paul V. Niemeyer concluded, in a twenty one page dissent, (App. A) that "the record in this case

shows, and the State concedes, that the delineation of congressional districts was based largely on classifications of voters by how they would vote in order to advance the interests of some existing Representatives, to assure one a "safe seat" at the expense of another, and to serve the political purposes of those involved in drawing the lines. The record shows, and the State also concedes, that racial classifications were made to create a district in which a black candidate would win and to remove the black voters of that district from the "safe seat" intended for another Congressman. The result of drawing lines using such impermissible classifications is the gerrymander depicted on the map attached;" and, he further concluded "that this denied the voters of Maryland a right to make their own choices about reelecting their

present congressman which could not be reconciled with Article I, Section 2, and Wesberry." Accordingly, he stated, he "would not permit an election to proceed on the basis of H.B. 10."

THE QUESTIONS ARE SUBSTANTIAL

I. A state may not take Affirmative Action and create a Super-Majority Minority Congressional Voting District [absent a finding of discrimination.]

A central purpose of the 14th Amendment is to further the Constitutional theme and national goal of equal opportunity among citizens in the exercise of their political rights, and any notion that one racial group, or classification of people, can be granted greater voting strength than another, is hostile to and at war with representative government. This is so

because all legal restrictions which curtail the civil rights of a racial group are immediately suspect and are, by their very nature, odious to a free people whose Constitution is founded upon a doctrine of equality which embodies a principle that neither knows nor tolerates classes among citizens. University of California Regents v. Bakke, 438 U.S. 265, 290-91 and Richmond v. J.A. Croson Co., 488 U.S. 469, 521 and Wesberry v. Sanders, 376 U.S. 1 (1964).

The only context in which this Court has approved the use of racial classification is to [remedy] the effects of a [finding] of past [discrimination]. Even then this Court has applied to [all] government classification by race, whether or not its asserted purpose is remedial or benign, the test of strict scrutiny,

requiring a demonstration of compelling state interest. 488 U.S. 469,493-495 (1988). However, there is [no finding of discrimination] in this case! The question begs an answer in this case. Why was there no finding of discrimination or disadvantage by the divided court below? Why did the State not present any evidence of discrimination or disadvantage which impaired the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and elect candidates of their choice? Thornburg v. Gingles, 478 U.S. 30 (1985). The reason is clear: there was no discrimination or disadvantage. One overriding fact leaps out from the body of evidence: the only reason offered by the State, through oral and written argument, for the extraordinary creation

of a new district was that everyone was [said to assume] that failure to create an open minority district would result in a voting rights lawsuit. Without doubt, assumptions of this type are of no legal value nor can they rise to the level of proof necessary to demonstrate or support a compelling state interest in granting one racial group greater voting strength than another.

By contrast, the plaintiff below did offer uncontradicted evidence that in incumbent Congressman Hoyer's old majority black populated district voters had already elected a black county state's attorney, a white county executive, a white county sheriff, a black county clerk of court, black judges, white judges, and black, white and Asian members to the Maryland General Assembly.

Again, absent a finding of past

discrimination affirmative action that involves racial classification in redistricting has never been held constitutional by this Court. Nor should it, for as Justice Scalia opined in his concurring opinion in Richmond v. J.A. Croson Co., "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation; discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society." 488 U.S. at 521 (1988).

When a state, [without a finding of discrimination,] creates a congressional district that is 68% minority populated and 32% non-minority populated, for no reason other than it [assumed its failure to do so would result in a voting rights lawsuit], it has subjected

to disability that 32% non minority and given advantage to that 68% minority for [no reason] other than [race]. This type of affirmative action has no foundation in reason or the spirit of our Constitution and certainly brings us no closer to a day when race is irrelevant. It only fosters notions of reverse discrimination and visits injustice to a different colored individual.

Likewise, section 2 of the Voting Rights Act offers no remedy, [absent a finding of discrimination or disadvantage], but rather affords "Citizens of all races... an equal chance of electing candidates of their choice..." Senate Report at 193, page 364, U.S. code Cong. and Administrative News 1982, page 364. Nor does the Act establish "a right to have members of a protected class elected in numbers equal to their population. 42 U.S.C. section

1973 2(b).

Thus, in evaluating a claim of vote dilution through districting under section 2 of the Act, a trial court must consider the totality of circumstances and [determine] based upon searching practical evaluation of past and present reality, whether the political process is [equally] open to minority voters. 478 U.S. 30 (1985). This language and logic is echoed in the intentional discrimination case of White v. Register, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). There, in addition to intent, this Court required [proof] that "political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect

legislators of their choice." Id. at 766. See also Whitcomb v. Chavis, 403 U.S. 124, 149 (1971). Clearly then, section 2 of the Act does not guarantee or ensure desired results, or, absent a finding of discrimination, permit a state to take affirmative action to establish a black super-majority minority district. It goes no further than to afford black citizens an equal opportunity to participate in the political process. In this case, there was no searching practical evaluation by the Court, because there was not even an allegation of discrimination let alone evidence that black citizens were not afforded an equal opportunity to participate in the electorial process, but there was [uncontroverted evidence] that blacks [did] equally participate and [did] elect candidates of their choice.

Nor does the State of Maryland's flawed legal and arrant analysis of United Jewish Organization v. Carey, 430 U.S. 144 (1977) permit race conscious redistricting, absent a finding of discrimination or disadvantage in the electorial process. First, this Court in United Jewish Organization, in the only portion in which a majority of the court joined, noted that the Court of Appeals had "observed that this case did not present the question of whether a legislature, [starting afresh], could draw lines on racial basis so as to bolster non-white voting strength, but rather the [narrower question] whether a state could use racial considerations in drawing the lines in an effort to [secure the Attorney General's approval] under the Voting Rights Act, 510 F. 2d 524 "430 U.S. at 154 (Justice White). (emp. sup.) Moreover, in University of

California Regents v. Bakke, the State of California cited United Jewish Organization as a case holding classification by race is constitutional permissible. This Court laid to rest any idea that United Jewish Organization indicated a willingness that voting districts could be drawn to enhance the electorial power of non-white voters absent a finding that voters were the "victim of an unlawful dilution under an original reapportionment plan" by stating: "United Jewish Organizations, like Lau, [properly] is viewed as a case in which the [remedy] for an administrative [finding of discrimination] encompassed measures to improve the previously disadvantaged group's ability to ... meaningful participation in the electorial process." 438 U.S. at 304, 305 (1977). (emp. sup.)

Nor does this Court's decision in Karcher v. Daggett stand for anything more than the conclusion that a state may preserve the voting strength of minorities. However, creating is the antithesis of preserving. The question therefore recurs; absent a finding of discrimination may a State take affirmative action and classify its citizenry by race? The State candidly asserts in its written and oral argument that there is no constitutional prohibition against classification by race and that by passing the Voting Rights Act Congress has approved Affirmative Action in Congressional Redistricting. The majority admits that Karcher does not address the creation of a minority district; however, they believe it is within the "aim" or "sense" of Karcher. This Court must correct these arrant analyses of our

Constitution, the Voting Rights Act and its own prior decisions by clearly mandating that the Constitution as well as the Voting Rights Act rest firmly on the cornerstone of equality for [all] citizens and that a government action that rests on a racial classification is never permissible - except as a [remedy for] and upon a [finding] of a [past] wrong or a [current] injury.

Therefore, if the decision of the divided three judge panel is permitted to stand, without oral argument to and meaningful guidance from this court, the Federal and State judiciary of this country will [assume] this Court has abandoned its prior mandates that a state may not encourage its citizens to vote for a candidate solely on account of race, Anderson v. Martin, 375 U.S. 399, 404 (1963) that preferring members of any one group for no reason other

than race or ethnic origin is discrimination for its own sake and constitutionally forbidden, University of California Regents v. Bakke, 438 U.S. 265, 37 (1977), that societal discrimination is an inadequate basis for race conscious classification and the government only has a compelling interest in favoring one race over another when there is a [finding of past discrimination], Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1988), that the desire to have more blacks within a defined category, standing alone, is insufficiently compelling to justify a racial classification, Id., at 496, that the core purpose of the 14th Amendment was to do away with all governmental imposed discrimination based on race, Palmore v. Sidoti, 466 U.S. 49, 432 (1983). If this be so, let [this court so hold] with clear reason. The

constitutional right involved requires no less.

II. A State may not classify its incumbent U.S. Representative by their term of seniority.

This Court has never squarely decided the issue of whether a State may classify U.S. Representatives in a Congressional Redistricting plan based on their term of seniority, 412 U.S. 783 (1972). In that case, the State of Texas asked this Court to hold that population variances in their congressional redistricting plan were justified as good-faith effort to "promote" constituency-representative relations." 412 U.S. at 791. However, this Court did not reach or decide this issue - "but we need not decide whether this state interest is sufficient to

justify the deviations at issue here, for Plan B admittedly serves this purpose as well as S.B. 1 while adhering more closely to population equality" 412 U.S. 7 at 791, 792.

The Court did explain "in the context of state reapportionment, . . . that the fact that district boundaries may have been drawn in a way that [minimizes] the number of [contests between incumbents] does not in and of itself establish invidiousness.", 412 U.S. 791, See also Karcher at 740; again on page 797 the Weiser Court repeated this same language when it noted that appellees themselves first submitted Plan B (the plan approved by this Court) which followed almost the same district boundaries the state used in its initial plan, S.B. 1.

From this language District Judge Smalkin makes his ill-founded leap in logic that "political classification"

[is not] constitutionally prohibited. The plain fact of this matter is again clear: this Court said no more than "we do not disparage" redistricting plans that [minimize] "contests between present incumbents."

Contrary to White vs. Weiser, in which lines were drawn to preserve and promote constituency representative relations, in the present case there is or was no constituency representative relationship to promote because H.B. 10 removed Congressman Hoyer from his old district and created a new district for him. Therefore, White v. Weiser is not dispositive of this case nor factually apposite to it. Furthermore, H,.B. 10 also does not minimize contests between junior incumbents. To the contrary, it created contests between two junior incumbents in order to protect Congressman Hoyer. However, here as in

White vs. Weiser there was also an alternative plan to H.B. 10, H.B. 22, and H.B. 22 was lower in population deviation, still created a minority district (if that be constitutional), and required no contests between incumbent Congressmen. The state of Maryland candidly opposed this plan because as Circuit Court of Appeals Judge Niemeyer noted in his dissenting opinion at App. A-78:

"The need to draw Representative Hoyer a "new" district arose from the [perceived need] to create a black-majority district in Prince George's County along the northeastern border of the District of Columbia. Hoyer's old district in Prince George's County would well have suited this requirement, but the legislators wanted to "guarantee" the election of a minority candidate and feared that Hoyer would lose if forced

to run in a minority district. As the State explained,

> '[An alternative plan], while creating a minority district, puts a white incumbent in the district. While this may have survived a legal challenge, this plan increases the probability that the State could lose one of its most senior and powerful congressmen. The legislature was at liberty to decide that the possibility of losing Congressman Hoyer was detrimental to the entire state. This plan would also have made it more difficult for a minority to be elected from that district.'

"Overriding desires expressed at the public meeting in Hyattsville, the legislators thus carved the county into two districts. The minority district, District 4, winds through Prince

George's County (conveniently avoiding the residence of Mr. Hoyer) and into southeastern Montgomery County. Consonant with Hoyer's wishes, District 5 includes the remainder of Prince George's County and all of Southern Maryland."

"Ironically, when questioned whether a "new white-majority district" should be created for Hoyer, seventy per cent of the Prince George's County voters polled responded "no." Statewide, sixty-five percent also responded "no." When made aware of these results, however, Senator Pica replied, "[K]nowing Congressman Hoyer's position in the House of Representatives, I would still try to preserve that status in Congress."

"Creating a minority district in which Hoyer would not run prompted the legislators to allocate the remaining seven districts among the eight

incumbent representatives. The final placement of the district boundaries in the center of the State was determined by the decision to eliminate Representative McMillan's former district and pit him, not against Bentley, Hoyer, or Cardin, but against the junior Republican Representative, Wayne Gilchrist, of District 1. Indeed, the precinct in which McMillan resides is the only one in the Crofton area which was included in that portion of Anne Arundel County that was swept across the bay into District 1."

"In light of this evidence, I find that the State did not use neutral criteria to establish its eight congressional districts. Instead, the driving force behind the placement of the new district boundaries was a desire to promote the election bids of certain incumbent representatives at the expense

of other, less senior incumbents. The Constitution gives to the voters of Maryland a right to make their own choices about reelecting their present Congressmen to represent them again in Congress. The State's attempts to defeat that right by manipulating district lines, either by unnecessarily pitting incumbents against one another or by enhancing the prospects of one candidate over another, cannot be reconciled with Article I, section 2, and Wesberry."

To the above Appellant would add three questions, the answers to which will clearly demonstrate why "political classification" is, and must be, constitutionally prohibited. By what doctrine of electoral fairness may a state provide advantage to a politician past the term of office for which he or she was elected by the people? Who is

it that a U.S. Representative represents, the state or the people of the district who elected him/her? And, if a senior representative (and thus his constituents) is granted preference and that preference creates contests between junior representatives (which one incumbent must obviously lose), have the junior representatives [and their constituents] received equal protection of the law?

This Court cannot let stand the clearly erroneous opinion of a divided three Judge panel that interprets White v. Weiser to permit "political classification" of U.S. Representatives based on their seniority, when concededly the Weiser Court clearly stated "we need not decide this issue." This Court must re-visit White vs. Weiser and give meaningful guidance.

III. Article I, section 2 of the U.S. Constitution permits no classification of people in any way which abridges their right to vote.

What the State and two District Judges below failed to recognize, is that this case centers not on the fragmenting of Anne Arundel County, but on diluting the vote of residents and members of political groups within Anne Arundel County, by a state policy that caused congressional district boundaries to be drawn based on race, political affiliation and past voting records of those citizens. This type of State policy must be what the Baker Court had in mind, when it spoke of discrimination reflecting "no policy, but simply arbitrary and capricious action." 369 U.S. 186, at 226 (1962). To hold otherwise is to allow a State to deprive

it's people of fair and direct representation in a manner that condones discrimination. Furthermore, any classification of people designed to impact their right to vote denies those people [equal protection] from invidious discrimination. What rule of reason condones depriving elements of a state citizenry of their ability to effectively participate in the electorial process? Certainly no argument can be advanced by the State that reason exists to give Congressman McMillen more democrats as H.B. 10 does, so that he would have a better chance against Congressman Gilcrest. See Affidavit of Delegate John Gary, App C.

In the present case, 45,000 people from Anne Arundel County were manipulated for this very reason! These 45,000 people are separated by [two] other Congressional Districts (unless

they have a boat) from that Congressional District which they were manipulated [not into but near to]! When questioned about this unique electoral geography, the President of the Senate merely stated: "It's not a good deal, but it's a deal and the cards have been dealt." This is clearly representative of the arbitrary and invidious State consideration that resulted in the classification and manipulation of people, in this case by their own legislators. Can it be that men of reason can not recognize the mandates of common sense? No citizen's right to an effective vote should depend upon a "legislative deal", good or bad! For as this Court has held, when attempting to draw districts of equal population, "the rule is one of practicability, rather than [political practicality."] Kirkpatrick v.

Preisler, 394 U.S. 526, 533 (1969). (emp. sup.)

This Court has held, that "not only can the right to vote not be denied outright, it cannot, consistently with Art I, be destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, or diluted by stuffing of the ballot box. "See United States v. Saylor, 322 U.S. 385 " 376 U.S. at 17 (1963). If one may not alter the ballot box, by what logic or law may one alter or arrange, through "deals", the procedure that leads to the ballot box? As Circuit Judge Niemeyer noted in his dissent: "where the final plan includes shapes that look more like characters on a Saturday morning television program than compact voting districts the court should look behind the plan to question how the legislature arrived at its final decision." Judge Niemeyer did, and

found: "The evidence in this case substantiates the suspicion that these districts were drawn to serve political interests, [a fact conceded by the State at oral argument]." dissenting opinion Appendix A-74. (emp. sup.)

To the contrary, District Judge Smalkin makes no reference to any evidence and [ignores] deposition testimony, affidavits, recorded Senate proceedings and baldly states, [without substantiation,] that "Plaintiff's have not shown any discriminatory vote dilution." What irony for those 45,000 citizens (one example from a record repleat with many) to be told that their person is to be counted only for purposes of equal population, in a district designed to be safe for their opponents, then to be also told that their vote has not been diluted and that they may go to the polls with [equal

dignity] on election day.

Elections, not self-constituted legislatures, are designed to express preference for a U.S. Representative. Classification of people [in any manner] designed to influence the outcome of an election inflicts harm on democracy and representative government. The very idea of democracy embedded in our Constitution forbids representatives from insulating themselves from the people. When a U.S. Representative depends on state legislators to manipulate lines on a map, as in this case, and thereby classify cohorts of voters, to diminish the political efficacy of certain voter's votes, that representative depends [not] on his constituents for his tenure in office but [upon] State legislators. Whatever representation means, it cannot mean that, because the people are then

deprived of their power to constitute the legislature. See The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Pol. Rev. 301 (1991). But perhaps Judge Smalkin was partially correct in stating that plaintiffs did not show vote dilution. Instead, they far exceeded the definition of dilution by [proving] that their votes were rendered ineffectual and wasted! Small wonder that voters when provided a description of gerrymandering which was not unlike the events which occurred in this case, disapproved of the process by a margin of [82%]. See. Assault on the Gerrymander, Wall Street Journal, December 20, 1989 at A14.

If the decision of the divided court below is permitted to stand, this court will be perceived to have abandoned the

high standard of justice and common sense which resulted in the Wesberry mandate that our Constitution leaves no room for classification of people in a way that unnecessarily abridges the most precious right people have in a free country - their right to vote. 377 U.S. 1 (1963). No more than a modicum of justice or common sense need be applied by this court to mandate that, in the achievement of the goal of equality of population, politicians who classify, arrange and manipulate people advance the work of discrimination in as sinister a manner as that worked by the circumstance of unequal population. Both operate to nullify the voting power of the citizenry.

How can it be argued, with reason, that this arbitrary, invidious and scheming classification of appellants does not deny them an effective

opportunity to influence the political process. Davis v. Bandemer, 478 U.S. 109 (1986).

IV. Malapportionment through classification of voters dilutes their right to effectively participate in an election.

Nothing is more fundamental to representative government than the guarantee of fairness in the process by which we the people choose our representatives. And the right to vote freely for the candidate of our choice, is the essence of our democratic society, and any restrictions on that right, strikes at the heart of our representative government. Reynolds v. Sims, 377 U.S. 533, 555 (1964). Elaborating on the purpose behind this right, the Reynolds Court declared that

full and effective participation by all citizens in government requires each citizen have an [equally effective voice]. Clearly this pursuit of voter equality must recognize that a numerically equal vote is not necessarily an equally effective vote, nor does it result in equal representation. Stated another way, if this Court truly intends to establish equal representation, it must recognize that "just as unequal population dilutes an individuals vote, malapportionment through classification of voters dilutes their right to effectively participate in an election. Viewed in this light classification of voters by party affiliation is no different than classification by race. Either is a violation of the same individual right recognized in Baker, Wesberry and Reynolds - The right to be free of

governmental tampering with one's vote.

The mandate of these cases fosters a rule that the equal distribution of political power was designed to give all voters an equal chance to be heard by their elected representatives. 377 U.S. at 565. While the notion of political equality most often arises in the context of equality of access to the political process, equal distribution of power in a democratic system may only be obtained on the basis of an equally effective vote.

The concept of equally weighted votes therefore,requires more than mere access to the ballot. It requires as well that an electorial system be structured so as to allow all voters a fair chance to influence the process of choosing representatives. Providing for such a fair chance is the only way to provide effective voter participation. Thus,

when a districting plan is based on discriminatory classification of people and voters, those so classified are denied their right to have a fair chance in determining who will represent them, and voting itself then becomes a futile and meaningless gesture, [even if the district is of equal population.]

The prestige and the authority of the Supreme Court derive from mandates predicated upon reason. Clearly, any judicial effort to ensure fair and effective representation through equality of voter district population, [purely a quantitative mandate], must include the additional judicial mandate which speaks to and recognizes the fact that political gerrymandering is a classification, of people which abridges the [qualitative basis] of an individual's right to vote. Previous judicial failures to include such an

additional mandate have been bluntly characterized, to the detriment of the political system and the court, as silly,[1] naive,[2] ridiculous,[3] absurd,[4] senseless,[5] counter productive,[6] sterile,[7] or inane.[8]

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[1] Shapiro, Gerrymandering, Unfairness and the Sup. Ct. 33 UCLA L.Rev. 227, 252 (1985).

[2] Id. at 234.

[3] Backstrom, Problems of Implementing Redistricting, in Representation and Redistricting Issues 43, 46 (Grofman, Lijphart, McKay & Scarrow eds. 1982).

[4] Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 113 n.161 (1985).

[5] Howard & Howard, The Dilemma of the Voting Rights Act - Recognizing the Emerging Political Equality Norm, 83 Colum L. Rev. 1615, 1650 (1983).

[6] Dixon, The Warren Court Crusade for the Holy Grail of "One Man One Vote" 1969 Supreme Court L. Rev. 219, 243.

[7] Baker, Whatever Happened to the Reapportionment Revoluation in the United States? in Electoral Laws and Their Political Consequences 257, 274 (Grofman & Lijphart eds. 1986).

After thirty years of judicial eye squinting, this Court recognized political gerrymandering as a justiciable issue in 1986, but could not then muster a majority of Justices of one mind. This case presents issues rich in opportunity from which the Court may articulate meaningful guidance to the Judiciary and to the Bar, while providing legislatures with fair notice of what they must do to stay within Constitutional bounds.

This Court must act to prevent State legislatures from minimizing or cancelling out the voting strength of political elements of the voting population. Gaffney v. Cummings, 412 U.S. 735, 751 (1972).

"The Fifteenth Amendment prohibits a state from denying or abridging a

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[8] Bickel, The Supreme Court and Reapportionment, in Reapportionment in the 1970s 57, 74 (Polsby ed. 1971).

negro's right to vote. The Nineteenth Amendment does the same for women. If a state weighted the male vote more heavily than the female vote or the white vote more heavily than the negro vote, none could successfully contend that the discrimination was allowable." Gray v. Sanders, 372 U.S. 368 (1963) A logical extension to the Court's language would read that a State may not weight the vote of members of one political group more heavily than that of another. This is so because, "... all who participate in the election are to have an equal vote - whatever their race, ...sex, ... occupation, ... income ... "The concept of "We the People," under the Constitution visualizes no preferred class of voters but equality..."372 U.S. 368 (1963).

CONCLUSION

This Court must act to prevent the invidious and arbitrary classification which has been visited upon the appellants, who are black, white, male, female, member and non members of political groups. There is no other recourse, else they and others endure, at a minimum, a decade of unequal and ineffective representation. For the reasons outlined in this statement, and the well reasoned dissent of Circuit Court of Appeals Judge Paul V. Niemeyer, this Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

John R. Greiber, Jr. *

*
Counsel of Record

APPENDIX A

OPINION BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, et al.	)	
	)	CIVIL
Plaintiffs	)	
	)	ACTION
v.	)	
	)	NO.
THE STATE ADVISORY BOARD OF ELECTION LAWS, et al.	)	S91-3200
	)	
Defendants	)	

: : : : : : : :

John R. Greiber, Jr., Annapolis, Maryland, for plaintiffs.

Evelyn O. Cannon, Baltimore, Maryland and Robert A. Zarnoch and Kathryn M. Rowe, Annapolis, Maryland, for State Administrative Board of Election Laws and Winfield M. Kelly, Jr.

James C. Praley, Glen Burnie, Maryland, for Board of Supervisors of Election of Anne Arundel County.

Filed: December 23, 1991

Smalkin, District Judge and Kaufman, Senior District Judge:

MEMORANDUM OPINION

Before Niemeyer, Circuit Judge, Smalkin, District Judge, and Kaufman, Senior District Judge.

I. INTRODUCTION

The plaintiffs in this case include citizens residing in Anne Arundel County, Maryland, as well as members of both the Republican and the Democratic party central committees of Anne Arundel County, Maryland. They object to the congressional redistricting plan approved by the Maryland General Assembly on October 22, 1991, following the 1990 Census. They filed suit in this court alleging jurisdiction

pursuant to U.S.C. SS 2284(a), 1331, 1343(3) and (4), and 42 U.S.C. S 1983, and venue pursuant to 28 U.S.C. S 1391(b).

Pursuant to 28 U.S.C. S 2284(a), a three-judge court, consisting of Circuit Judge Paul V. Niemeyer, District Judge Federic N. Smalkin, and Senior District Judge Frank A. Kaufman, was convened by Order of Chief Circuit Judge Sam J. Ervin, III, and heard arguments on the plaintiffs' motion for preliminary injunction and the defendants' motion to dismiss and/or for summary judgment, as well as on the merits of the case (by agreement of both parties), in open court December 13, 1991. The Court has considered exhibits received at that hearing, as well as the parties' stipulated facts. The Court has also considered plaintiffs' three page Post-Argument Summary, delivered to this

Court on December 16, 1991.

This case having been submitted to the Court for determinations of fact and law, we now proceed to state our findings of facts and conclusions of law.

II. FACTUAL BACKGROUND

The population of Maryland was determined by the 1990 Census to be 4,781,468. As a result, Maryland was assigned eight seats in the United States House of Representatives, the same number as it had based on the 1980 Census. Thus, the ideal congressional district would now contain 597,683.5 people.

In May, 1991, the Governor of Maryland appointed a Redistricting Advisory Committee. The task of this committee was to make recommendations on any boundary changes for legislative and congressional election districts made

necessary by shifts in Maryland's population, as indicated by the 1990 Census results. This the committee did, in a plan issued in August, 1991.

The committee soon abandoned this first plan, and approved a second plan on September 19, 1991. The first plan was, however, the basis for a bill introduced in and passed by the Senate of Maryland as Senate Bill 13 on September 25, 1991, the first day of a special session of the state's General Assembly convened for the purpose of redistricting. The committee's second plan was introduced and passed by the House on that same day, as House Bill ("H.B.") 7.

Numerous amendments to these two plans were offered, of which one, a plan offered by Delegate John J. Bishop and designated as H.B. 22, had an overall population deviation of nine people and

an average population deviation of 2.49 people. Another alternative plan, H.B. 10, had an overall population deviation of eleven people and an average deviation of four people.

There followed a prolonged legislative process fraught with political and regional give-and-take, at the end of which H.B. 10 was passed by the Senate on October 21, 1991 and by the House on October 22, 1991. Since the time of that plan's introduction, its population deviation had been improved to a maximum of ten people and an average of 2.75 people.[1] The bill was signed into law

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[1] At trial and for our purposes here, the numerical devia-tions in H.B. 10 were calculated based upon the Maryland Attorney General's interpretation of the bill, as it should be read in order to correct a drafting error. (See State's Mem. of Law at 9-10; Stipulations of Fact 85.) Plaintiffs do not take issue with this reading of the bill. The population deviation in H.B. 10, broken down by congressional district, is as follows:

by the Governor on October 23, 1991, and this lawsuit quickly followed.

The plaintiffs allege that the Maryland General Assembly failed to make a good-faith effort to achieve numerical equality among the right new congressional districts, and, in fact, that H.B. 10 was adopted with the discriminatory intent to "deprive the plaintiffs of an opportunity to effectively participate in the political process," in violation of their rights under Article 1, S 2 of the United States Constitution. (Plaintiff's Compl., at 19.) The plaintiffs also allege that H.B. 10 represents an unconstitutional "gerrymander." At the

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District 1	+ 1
District 2	0
District 3	- 3
District 4	+ 7
District 5	+ 1
District 6	+ 5
District 7	- 3
District 8	- 1

heart of the plaintiffs' argument is that Anne Arundel County, the State's fourth most populous county and formerly part of the State's Fourth Congressional District, has been divided by H.B. 10 among four separate congressional districts, thus "diluting" the votes of the residents.

3. ANALYSIS UNDER KARCHER

Article I, S 2 of the United States Constitution provides that the members of the House of Representatives will be chosen "by the People of the several States," with equal representation for equal numbers of people. Wesberry v. Sanders, 367 U.S. 1, 7-8 (1963). This Constitutional mandate "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Id. Consequently, congressional districts are to be apportioned to achieve

"precise mathematical equality." Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

The Supreme Court's most recent pronouncement concerning Article I's "one person, one vote" requirement is found in Karcher v. Daggett, 462 U.S. 725 (1983). Karcher sets forth a two-part test for considering the legal significance of population deviations in a state legislature's apportionment of congressional districts. First, those challenging a redistricting plan for alleged failure to comply with Art. I, S 2 bear the burden of proving that "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." Id. at 730. If the opponents of a redistricting plan "can establish that the population differences were not

[unavoidable nor] the result of a good-faith effort to achieve equality," then the burden shifts to the state. In this second step, the state must prove that "each significant variance between districts was necessary to achieve some legitimate goal." Id. at 731. The State's justification for contested numerical disparities must be made "with particularity." Id. at 739.

Here, the defendants argue that the deviation from absolute numerical equality present in H.B. 10 is too trivial to rise to a constitutionally significant level. (State's Mem. In Supp. of State's Opp'n to Mot. for Prelim. Inj. and State's Mot. to Dismiss and/or for Summary Judgment at 14-15) Claiming that the variations from absolute equality are "unavoidable," the defendants seemingly contend that H.B. 10 represents a good- faith effort to

achieve population equality, satisfying Art. I, S 2, and the first prong of Karcher, thus making it unnecessary for this court to each the second prong of Karcher. In addition, however, the defendants assert that if the second prong of Karcher is reached, they have met their burden thereunder.

We disagree with the defendants as to prong one of Karcher. While it is true that the deviation herein is very small, Karcher specifically holds "that there are no de minimis variations which could practically be avoided, but which nonetheless meet the standard of Art. I, S 2 without justification." Karcher, 462 U.S. at 734 (emphasis added). "Art. I, S 2 . . . permits only the limited population variations which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." Id. at

730 (quoting Kirkpatrick, 394 U.S. at 531 (emphasis added)). Justification, however, "belongs more properly to the second level of judicial inquiry . . . in which the State bears the burden of justifying the [statistical] differences with particularity." Id. at 739.[2]

In the present case, H.B. 10 has an average variance among Maryland's eight congressional districts of 2.75 people, while H.B. 22 has an average variance of 2.49 people. (Stipulations of Fact paras. 77 and 84.) Given the existence of H.B. 22, a plan with a smaller numerical deviation from absolute

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[2] Recently, a three-judge district court in Illinois, Hastert v. State Board of Elections, ___ F. Supp. ___ (N.D. Ill. 1991), 1991 W.L. 228185, Nos. 91 C 4028, 91 C 4154, 91 C 4643, 91 C 5472, applied Karcher in an Art. I, S 2 congressional redistricting case. The Hastert court concluded that, under Karcher, there is no acceptable departure from absolute numerical equality among congressional districts which will insulate a proposed redistricting plan from further scrutiny.

equality, plaintiffs have proved that H.B. 10's deviations did not result from an unavoidable good faith effort to achieve population equality. Thus, we disagree with defendants and hold that the mathematical variations in this case, even though relatively small, enable plaintiffs to satisfy Karcher's first prong and shift to the State the burden of proving justification under prong two of Karcher:

> The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of

> alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

Karcher, 462 U.S. at 741 (emphasis added).

It is under Karcher's second prong that we now consider the relatively insignificant mathematical deviations in this case. We note that the amount and degree of justification which the State must establish is roughly equatable to the deviation itself. In that light, we consider the aims of the State of Maryland which have caused it to enact the particular congressional

redistricting plan before us.

In Karcher, Justice Brennan provided guidance for the determination of what state objectives might justify deviations from numerical equality among the congressional districts:

> Any number of consistently applied legisla-tive policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, . . . these are all legitimate objectives that on a

> proper showing could justify minor population deviations.

Id. (citations omitted).

Both in the evidence presented and in oral argument, the State has set forth several convincing, consistent, and legitimate justifications for the numerical deviations within H.B. 10.[3] These include: (1) keeping intact the three major regions that surround the center of the state (specifically, the Eastern Shore, Southern, and Western Maryland), (2) creating a minority voting district, and (3) recognizing incumbent representation, with its attendant seniority, in the House of

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[3] See The Supreme Court, 1982 Term--Leading Cases, 97 Harv. L. Rev. 70, 141 (1983), suggesting that Karcher teaches that such justifications are to be considered flexibly by the courts.

Representatives.[4] (See State Mem. in Opp. at 23-28, see also the dissenting opp. hereto, at 38-41). We conclude that these justifications, which the State alleges are properly within the ambit of a state legislature's redistricting latitude and designed to achieve legitimate state goals, are sufficient to warrant the very small numerical variance among the congressional districts seen here. The analysis mandated by the Supreme Court cases applying Art. I, S 2 is, therefore, satisfied.

The dissent takes the position that Karcher's numerical analysis is merely the beginning at the Art. I, S 2 inquiry. As we read the dissent, no state "classification" of "the people" (apparently a broader category than

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[4] See White v. Weiser, 412 U.S. 783, 791 (1972).

voters) that is the product of any political consideration is constitutionally justified. Only "neutral" classifications, such as natural geographic barriers, points of the compass, or, perhaps, historical municipal and county subdivision boundaries, are to be considered by the legislature as it apportions its population for the House of Representatives. In short, the dissent would appear to advance a position that would hold unconstitutional any redistricting plan that was in any way affected by considerations that could be labelled "political."

In Karcher's footnote 6, Justice Brennan noted that Kirkpatrick's and Karcher's mandate for population equality among congressional districts alone would do "little to prevent what is known as gerrymandering." 462 U.S.

at 734. Of course, nothing prevents the plaintiff/opponents of a redistricting plan from challenging that plan on constitutional grounds either inside or outside of Art. 1, S 2. Any prohibited classification of or distinction among "the people" is still cognizable, for example, under the rubric of the First and Fourteenth Amendments. See, e.g., Davis v. Bandemer, 478 U.S. 109 (1986).[5] The protections provided within Art. 1, S 2 speak for themselves. Further, the protections provided by the First and Fourteenth Amendments, as well as by many other parts of our Federal Constitution, provide a backstop to the "one person, one vote" requirement in Art. I, S 2. Moreover, as Justice Brennan recognized in footnote 6 of Karcher, state constitutional and

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[5] See discussion post at 13.

statutory provisions also serve a similar backstopping purpose.

The idea that Art. I, S 2 prohibits taking any "political" factors into account is flatly contradicted by the language in Karcher itself:

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time.

462 U.S. at 739. Nor is such a discussion unique to Karcher. The Supreme Court has long recognized the appropriateness of political considerations within the redistricting

process. In White v. Weiser, 412 U.S. at 794, the Court noted that "from the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination . . . . " Indeed, the Court there recognized and "d[id] not disparage" the state defendants' policy of promoting:

> " 'constituency-representative relations,' a policy frankly aimed at maintaining existing relationships between incumbent congressman and their constituents and preserving the seniority the members of the State's delega-tion have achieved in the United States House of Representatives."

Id. at 791. Surely, such language does

not recognize any command in Art. I, S 2 that "political" classifications cannot be made during redistricting.

As Justice Brennan has made clear, the Supreme Court is willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts.

Karcher, 462 U.S. at 740 (emphasis added).

In this case, this Court defers to Maryland's legislature. The evidence, as the dissent states, shows that the General Assembly, inter alia, aimed to give Congressman Hoyer, a congressman with high ranking and importance in the federal House of Representatives, a "safe seat," to provide the majority black population in an area of Prince George's and Montgomery counties with a

chance to choose a representative without requiring that person to run against a strong incumbent such as Congressman Hoyer, and to provide certain opportunities for Congressman Bentley and Congressman Cardin. Dissenting Opp. at 18-21. The reelection of incumbents as such was not listed specifically by Justice Brennan in Karcher as an example of an affirmative legislative justification sufficient to meet Karcher's second prong, though recognized in White v. Weiser. Neither is the establishment of a majority black district listed specifically in Karcher, but "preserving the strength of racial minority groups" is discussed. Karcher, 462 U.S. at 742. These aims, however, are clearly within Karcher's ambit. While Justice Brennan there concluded that the District Court's finding of a lack of causal

connection between racial voting aims and the redistricting plan at issue was not "clearly erroneous," id. at 743, the sense of Karcher strongly suggests that if, as here, such a causal connection does exist, such aims can constitute an appropriate Karcher second-prong basis.

We also note that the "neutral criteria" redistricting called for by the dissent would in no way ensure maintenance of the territorial integrity of Anne Arundel County, which is what brought on this suit in the first place. Rather, adoption of the dissent's position would potentially subject every congressional district in the United States to novel constitutional scrutiny. Furthermore, to mandate that a legislature reapportion with regard merely to "neutral criteria" (except for the dictates of the Voting Rights Act and the Fifteenth Amendment) is to give

that legislature, in practice, no guidance at all. Indeed, it virtually guarantees that a federal court, in a sort of judicial receivership, will ultimately conduct redistricting--a process the Supreme Court has consistently recognized as political.[6]

IV. OTHER CONSTITUTIONAL CONSIDERATION

Plaintiffs also contend that H.B. 10 represents an unconstitutional "gerrymander," and therefore that the Maryland General Assembly has discriminated against them, in violation of the Equal Protection Clause of the

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[6] We note that during the Maryland Senate Proceedings on October 21, 1991, the following colloquy took place:

PRESIDENT MILLER: We labored mightily, the majority leader and the chairman and myself, and we made a conscious decision that it was better that we adopt this plan with these modifica-tions than let a nonelected federal judge, a non-political person draw a map for us.

VOICE: God help us.

Pls. Ex. 17 at 80-81.

Fourteenth Amendment. In support of their position, plaintiffs cite Davis v. Bandemer, 478 U.S. 109 (1986), in which the Court held that gerrymandering for political purposes is justiciable under the Equal Protection Clause of the Fourteenth Amendment.[7]

What plaintiffs have presented in this instance is not a case of political gerrymandering as seen in Davis. The Court in Davis limited its holding--that political gerrymanders are justiciable--to cases involving partisan bias. "[E]ach political group in a State should have the same chance to elect represen-tatives of its choice as any other political group." Davis, 478 U.S. at 124. Where a legislature

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[7] As a threshold issue, we note that in Davis the Supreme Court was called upon to address a challenge to the partisan redistricting of the Indiana legislature, not to congressional redistricting.

intentionally draws lines "to afford political groups in various districts an enhanced oppor-tunity to elect legislators of their choice . . . 'we must . . . respond to [the] claims . . . that even if acceptable population-wise, the . . . plan was invidiously discriminatory because a 'political fairness principle' was followed.'" Davis, 478 U.S. at 124-25 (quoting Gaffney v. Cummings, 412 U.S. 735, 751-52 (emphasis in original)). Thus, in Davis, the Supreme Court only reached the question of whether, where one political party makes a claim of discrimination during redistricting, the issue is justiciable.

In the case before this Court, the plaintiffs represent both the Anne Arundel Democratic and Republican parties. The type of partisan discrimination treated in Davis

apparently has not occurred here. Indeed, the plaintiffs contend that the discrimination which they suffer as a result of H.B. 10 stems from the effect that the division of Anne Arundel County has on the plaintiffs' ability to "effectively participate as a [group] and thereby influence the elective process and to secure the attention of the winning candidate." (Plaintiffs' Mem. in Opp. to State Defendants' Mot. to Dismiss And/Or Mot. for Sum. Judg. at 35.) In essence, therefore, the plaintiffs contend that they, as Anne Arundel County voters, have some form of constitutionally significant community interest which will be diluted if H.B. 10 goes into effect.[8]

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[8] Anne Arundel County is not the only County divided by HB 10. Others include Montgomery, Howard and Prince George's, all divided between two districts, and Baltimore City and Baltimore County, each divided among three districts.

Assuming justiciability and reaching the merits,[9] this federal court must keep in mind that the voice of the people of Maryland is most directly heard through the General Assembly of Maryland. While the interests of "the people," as the dissent emphasizes, predominate, the "people" of the State of Maryland cannot in 1991, even if they could have so done in 1789, practically be heard individually *via* a state-wide town meeting of the whole. The most direct channel of action by the "people" is *via* their elected representatives in

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[9] The standard for establishing justiciability is well settled. *See* *Baker v. Carr*, 369 U.S. 186 (1961). The court in *Baker* elucidated a three-part test: (1) the issue must not be more properly decided by a coequal part of government, (2) there must be no risk of foreign or domestic disturbance or embarrass-ment, and (3) there must be judicially discernible and manageable standards by which the case can be decided. *Id.* at 266. Both the second and third prongs of this test give us pause in this case.

both houses of Maryland's legislature--a branch of our total governmental structure, as is this Court. A federal court, in scrutinizing a congressional redistricting plan, should therefore think long and hard about rejecting the reasons--the justifications--of the state legislature.[10]

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[10] In keeping with the dissent's historical analysis, we note that gerrymandering was not conceived out of the blue in this country. The "rotten borough"--one that had few electors or voters--was a similar concept and one that long plagued the English. A rotten borough was used to give a seat in Parliament to a person whom a political party wished to reward, albeit often a very able person.

Pocket boroughs, in which the member of parliament could purchase his seat, similarly diluted the vote of the people whom he represented. Representative of the attitude that such politicians had toward their electorate is the following:

> The following letter was written by Anthony Henley, Member of Parliament for Southampton from 1727 to 1734, to his constituents who had protested to him about the Excise Bill:

It is in such context that we consider and reject the plaintiffs' challenge to what they label as unconstitutional gerrymandering. We do not, as the dissent suggests, believe that there are

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Gentlemen,

> I received yours and am surprised by your insolence in troubling me about the Excise. You know, what I very well know, that I bought you. And I know, what perhaps you think I don't know, you are now selling yourselves to Somebody Else; and I know what you do not know, that I am buying another borough. May God's curse light upon you all: may your houses be as open and common to all Excise Officers as your wifes [sic] and daughters were to me, when I stood for your scoundrel corporation.

Yours, etc.,

Anthony Henley

John Julius Norwich, Christmas Crackers 93 (1986).

Rotten boroughs and other electoral anomalies were eliminated by Parliament, not by judicial decree, in the Reform Act of 1832. See generally 13 William S. Holdsworth, A History of English Law 239-59 (1952).

no limits upon gerrymandering. We do not hold that the State is correct in conceding that under its interpretation Article I, S 2, would not be violated by a district line drawn to snake through the alleys and cul-de-sacs of 23 different counties in order to match two white people for each black, or two democrats for each republican, for the purpose of advancing the chances that the favored class would win an election while diluting the vote of the unfavored class.

Dissenting Op. at 21. We do not have that specific example before us and therefore do not reach it.[11] If the

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[11] What constitutes political gerrymandering going so far beyond the pale as to be unacceptable in our federal constitu-tional setting is hard to define. But as Justice Stewart once wrote about pornography, most of us "know it when we see it." See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). We can well afford, as Justice Brennan, writing in Karcher seems to have had in

territorial of Anne Arundel County is a classification--a proposition we doubt,[12] but also do not reach--it, like all classifications, must have a reasonable basis in fact, even if no suspect criterion such as race, religion, sex or the like is involved.

Underpinning the dissent appears to be the proposition that, independent of Karcher and of the numerical "one person-one vote" doctrine, political gerrymandering can be so egregiously unbearable that it cannot pass federal constitutional muster. We do not, and need not in this case, question that position. See, e.g., Karcher, 462 U.S. at 744 (Stevens, J., concurring); Daniel D. Polsby & Robert D. Poppa, The Third

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mind, leaving to another day and to another case the task of establishing federal constitutional limits to gerrymandering in congressional districting.

[12] See supra at 14.

Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale Law & Pol. Rev. 301 (1991). As Justice Brennan has noted, "[a] federal principle of population equality does not prevent any State from taking steps to inhibit gerrymandering, so long as a good-faith effort is made to achieve population equality as well." Karcher, 462 U.S. at 724 n.6.

The dissent may be suggesting that political considerations which constitute appropriate justifications under Karcher's second prong somehow violate Art., I, S 2, or other federal constitutional mandates, or both. The answer to any such approach, however, is that the Supreme Court would hardly have put its stamp of approval on a justification under Karcher's second prong, if such justification were constitutionally invalid for any other

reason. In any event, a federal court is not prevented from granting relief under any available federal constitutional provision if gerrymandering violates it, and if the matter is justiciable. The point is that carving Anne Arundel County into four pieces--while perhaps enough to raise eyebrows--does not violate any federal constitutional provision, including the mandate of Art. I, S 2, to give full effect to the voice of the "people."

Furthermore the plaintiffs have not shown any discriminatory vote dilution. See Davis, 478 U.S. at 143. Nothing the plaintiffs have presented to this Court indicates that their vote will necessarily be any less powerful in any of the four congressional districts in which they will now reside. Nothing prevents the plaintiffs from joining the

local organizations of the political parties of their choice and having whatever power they had previously to influence the political process. Thus, assuming arguendo that they present a justiciable issue, the plaintiffs fail to make a Davis showing of vote dilution.

Plaintiffs' claim also fails under a First Amendment analysis. Nothing about H.B. 10 affects in any proscribed way the plaintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.

To the extent that plaintiffs--and any of their follow Anne Arundel Countians--

are legitimately distressed by H.B. 10, they have suffered a political setback, but not a violation of their federal constitutional rights, through the action of "the people" as expressed by the directly elected representatives of "the people" of Maryland.

Based upon the principles articulated herein in the context of the evidence presented in this case, this Court concludes that the State defendants, on the merits, are entitled to judgment in their favor. Accordingly, judgment will be entered in their favor, by a separate order.

/S/ Frederic N. Smalkin
FREDERIC N. SMALKIN
United States District Judge

/S/ Frank A. Kaufman
FRANK A. KAUFMAN
Senior United States District Judge

Date: _____

NIEMEYER, Circuit Judge, dissenting:

The Maryland legislature, using data about voters' political party registrations, their past voting habits, and their race, drew congressional district lines to depict the classic gerrymander in an attempt to control the outcome of future congressional elections. Because the use of such classifications in drawing district lines favors one class and of necessity dilutes the vote of another, the people are not represented directly and equally, as required by Art. I, S 2, of the United States Constitution.

I concur with the conclusion reached by the majority that the requirements of Karcher v. Daggett, 462 U.S. 725 (1983), have been satisfied by H.B. 10 in that each of the eight congressional districts created by it has, for all practical purposes, an

equal population. I would not even find it necessary to pass from step one to step two of the Karcher analysis. Step one requires a determination of whether a good faith effort was made to divide the state into districts equal in population. Only if there is a "significant variance" between districts must step two be reached, which requires that the state justify the variance. Id. at 731. In this case the greatest variance from the "ideal" district is seven persons. No policy or consideration, in my judgment, is served by shifting three or four persons from one district to another or needs to be advanced for failing to shift them.

The major failing, I respectfully submit, of the majority opinion is its acceptance of the position advanced by the State that once the requirements of Karcher are satisfied, the analysis

ends. In other words, the majority holds that Karcher establishes a per se rule that once equality of numbers is achieved, no further analysis is appropriate to determine whether the requirements of Article I, S 2, have been met, even if the state's motive in establishing district lines were found to be invidious and the effect of its delineation were found to be the total dilution of the vote of a recognized class of people or voters. That position leads to the conclusion that politically or racially drawn lines, however gerrymandered, cannot violate Article I, S 2. The State thus conceded at oral argument that under its interpretation, Article I, S 2 would not be violated by a district line drawn to snake through the alleys and cul-de-sacs of 23 different counties in order to match two white people for each black,

or two democrats for each republican, for the purpose of advancing the chances that the favored class would win an election while diluting the vote of the unfavored class.

While Karcher appropriately addresses vote dilution created by numerical inequalities among districts, it was never intended to overrule the other Supreme Court holdings, such as Wesberry v. Sanders, 376 U.S. 1 (1964), which recognize the Constitution's prohibition against vote dilution by any classification and require that representation of the people be direct and equal. Karcher decided only the issue of when a variance in population among districts can be justified. The majority extends this limited holding to conclude that Article I requires nothing more than population equality. But in response to this dissenting opinion, the

majority concedes "we do not . . . believe there are no limits upon gerrymandering" imposed by Article I. Recognizing the difficulty of making that concession, because gerrymandering "in our federal constitutional setting is hard to define," the majority concludes that "most of us 'know it when we see it'" (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (attempting to define pornography). Without acknowledging that our founding fathers intended to avoid duplicating the "rotten boroughs" problem of London, not by relying on state legislatures, but in adopting Article I to provide direct and equal representation of the people, see Debates in the Federal Convention of 1787 as Reported by James Madison 202 (James McClellan & Melvin E. Bradford eds., 1989) [hereinafter Elliot's

Debates] (statement of James Wilson; id. at 207-08 (statement of James Madison), the majority recognizes the prohibition against gerrymandering, but only when it subjectively defines it as such.

In defending its plan on the contention that the states are free to draw district lines in any way they see fit, so long as each district includes the same number of people, the State fails to recognize that this case centers, not on a reapportionment of the Maryland legislature, but on the effectuation of the people's election of their Representatives in Congress. The distinction is both clear and critical. "There are fundamental differences between congressional districting under Art. I and the Wesberry line of cases on the one hand, and, on the other, state legislative reapportionments." Gaffney v. Cummings, 412 U.S. 735, 741-42

(1973). Despite arguments by the State to the contrary, a state's role in constituting a House of Representatives is limited by federal law to establishing the "time, place and manner" of elections and to sending Representatives to Congress from districts that provide a "direct and equal" representation of the people, all of them. To accomplish that purpose no classification of the people can be made to advance the state legislature's preference for one class to the detriment of another, and clearly the state may not attempt to dictate the outcome of congressional elections.

In this case the record shows, and the State concedes, that the delineation of congressional districts was based largely on classifications of voters by how they would vote in order to advance the interests of some

existing Representatives, to assure one a "safe seat" at the expense of another, and to serve the political purposes of those involved in drawing the lines. The record shows, and the State also concedes, that racial classifications were made to create a district in which a black candidate would win and to remove the black voters of that district from the "safe seat" intended for another Congressman. The result of drawing lines using such impermissible classifications is the gerrymander depicted on the map attached.

A prohibition of Article I against classifications that are based on how the voters voted and can be expected to vote, for the purpose of steering the outcome of an election, does not, as the majority suggests, fail to recognize the political process inherent in every legislative act. Any

legislative act is "political" to the extent that each legislator votes on the basis of personal philosophy, constituency, and the desire to be reelected. That is far different than a law enacted by the legislature which is designed to manipulate an election outcome out of fear that neutral criteria would permit the people to vote otherwise.

Because drawing lines that purposefully advance on political interest of necessity dilutes the opposing interest and therefore violates Article I, S 2, of the Constitution, I would not permit an election of Representatives to Congress to proceed on the basis of H.B. 10.

I

The legislative power of the United States is vested in a bicameral legislature, one body of which, the

House of Representatives, is intended to represent the people of the several states, and the other, the Senate, as originally intended, to act as a representative body for the states themselves. See U.S. Const. Art. I, SS 1, 2 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.") As described by James Madison in The Federalist No. 39,

> [t]he House of Representatives, like that of one branch at least of all the State Legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of

> Maryland, derives its appointment indirectly from the people.

An important distinction is thus deliberately made between the states and the people.

The framers debated long whether the states should act as political agents for the people in selecting members of Congress, or whether instead the people deserve and require direct representation in the federal legislature. "While those who wanted both houses to represent the people had yielded on the Senate, they had not yielded on the House of Representatives. William Samuel Johnson . . . had summed it up well: 'in one branch the people, ought to be represented; in the other, the States.'" Wesberry, 376 U.S. at 13 (quoting 3 The Records of the Federal Convention of 1787 462 (Farrand ed. 1911) (emphasis in original)). Argument

centered not only upon the appropriate method of ascertaining and distributing the relative power of representation among the states, but also, perhaps as importantly, upon the appropriate structure for assuring that the people, and not the state legislatures, achieve meaningful representation in the federal legislative body.

Article I, which is the outcome of that debate, clearly establishes the House of Representatives not only as a means for ensuring a distribution of political power on the federal level which corresponds to the relative populations of the states, but also as the body that is intended to represent the people and not the states. See Elliot's Debates at 75 ("Mr. Madison considered an election of one branch at least of the Legislature by the people immediately, as a clear principle of

free [Government] and that this mode under proper regulations had the additional advantage of securing better representatives, as well as of avoiding too great an agency of the State Governments in the General one.") (emphasis added); id. at 39-45 (reporting that some delegates disfavored popular election of the first branch of the legislature, while others, including Mr. Mason and Mr. Wilson argued strongly for an election of the larger branch of the legislature by the people); Wesberry, 376 U.S. at 14 ("The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality

. . . .").

The deliberate and careful distinction thus made in the House of Representatives for representation of

the people and not the state legislatures is preserved throughout the provisions establishing the House of Representatives and regulating its membership. Even the question of who voted for members of the House of Representatives was not the ultimate question, so long as whoever was entitled to vote represented the people. Reasoning from a principle that the state governments had already been constituted by the people and from a desire to harmonize voting privileges in the given States so that voter qualifications would be similar to state and federal elections, the founders carefully bypassed state legislatures and tied the right to vote to the provisions in each state constitution providing voting rights for its largest legislative house. Some were concerned with the problems which might arise from

the establishment of differing qualifications for federal and state elections. See Elliot's Debates at 382 ("It would be very hard & disagreeable for the same persons at the same time, to vote for representatives in the State Legislature and to be excluded from a vote for those in the [National] Legislature.") (statement of Mr. Wilson). But most delegates primarily feared putting power to modify elector qualifications in the hands of either the state or the federal legislature. "The right of suffrage was a tender point, and strongly guarded by most State Constitutions." Id. at 383 (statement of Mr. Elseworth). Colonel Mason from Virginia agreed: "A power to alter the qualifications would be dangerous power in the hands of the Legislature." Id.; see also id. at 385 ("A gradual abridgment of [the right of

suffrage] has been the mode in which Aristocracies have been built on the ruins of popular forms.") (statement of Mr. Madison). In the end, it was determined that the right of suffrage must be left ultimately to neither state nor federal legislatures, but to the people. Thus the ability to vote for members of the House of Representatives was tied to the existing qualifications, fixed by state constitutions, for the most numerous body of the state legislatures. See U.S. Cont. Art. I, S 2, cl. 1. As noted in The Federalist No. 52 (James Madison),

> [t]he provision made by the convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established or which may be

established by the State itself. It will be safe to the United States; because, being fixed by the State Constitutions, it is not alterable by the State Governments, and it cannot be feared that the people of the States will alter this part of their Constitutions, in such a manner as to abridge the rights secured to them by the Federal Constitution.

(emphasis added).

Only in setting the time, place and manner of elections did the framers expressly defer to state legislatures, and then only with the reservation to the federal government of ultimate power on the issue. Article I, S 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof;

but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." See also Elliot's Debates at 403 ("[T]he Legislatures of the States ought not to have the uncontrolled right of regulating the times places & Manner of holding elections . . . . It was impossible to foresee all the abuses that might be made of the discretionary power.") (statement of Mr. Madison); id. at 404 ("If this power be not given to the [National] Legislature, their right of judging of the returns of their members may be frustrated.") (statement of Mr. King).

There can be no question that the issue of determining the method of selecting members of the House of Representatives is uniquely and exclusively a federal question, with only a limited role given to the states.

See Ex Parte Yarborough, 110 U.S. 651, 663 (1884) ("It is not true . . . that electors for members of Congress owe their right to vote to the State law . . . . "); United States v. Classic, 313 U.S. 299, 315 (1941) ("While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by S 2 of Art. I . . . . .") (citations omitted). The Constitution finally summarizes the supremacy of the federal role when it provides that each House of Congress is responsible for judging elections and the qualifications of its members. See U.S. Const. Art. I, S 5, cl. 1. And no exception is made for determining the size, location, and configuration of

congressional districts. These must conform to the principle of establishing direct representation of the people, as required in Article I.

Article I makes no requirement that members of Congress represent districts within a state, so long as the number allocated to a given state is determined by population. Congress did for many years mandate and actively regulate congressional districting, but since 1929 it has assumed a less active role in that regard. See Wesberry, 376 U.S. at 42-44 (Harlan, J., dissenting). This leaves to the states that role, but always in service to the federal government and the people in accordance with the federal Constitution. Cf. White v. Weiser, 412 U.S. 783, 797 (1973) ("Of course, the District Court should defer to state policy in fashioning relief [in congressional

redistricting case] only where the policy is consistent with constitutional norms and is not itself vulnerable to legal challenge.").

When a state divides itself into districts, the division must preserve the representation of the people, directly and without interference by any agency of the state legislature. The direct representation of the people inherently requires that all the people of a state be represented, and to accomplish that goal the representation must be equal. This theme, that the representation of the people in the House of Representatives must be direct and equal, was recurring and consistent in the debates of the framers, and was adequately and early summarized by Justice Story:

> We accordingly find, that in the section under consideration, the

> house of representatives is required to be composed of representatives chosen by the people of the several states. The choice, too, is to be made immediately by them; so that the power is direct; their influence direct; and the responsibility direct. If any intermediate agency had been adopted, such as a choice through an electoral college, or by official personages, or by select and specially qualified functionaries pro hac vice, it is obvious, that the dependence of the representatives upon the people, and the responsibility to them, would have been far less felt, and far more obstructed.

Joseph Story, Commentaries on the Constitution of the United States S 292 (1833) (emphasis added). In a detailed analysis of Article I, the Supreme Court

reached the same conclusion in Wesberry. Reciting the debates, the Supreme Court stated that "the House of Representatives was meant to be free of the malapportionment then existing in some of the state legislatures" and that Congress' supervisory power under Article I, S 4, was intended "to vindicate the people's right to equality of representation." Wesberry, 376 U.S. at 16. Equal representation provides to the people a vote of equal weight wherever the people are located. Thus, the Court said, "[e]lections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state." Id. at 17 (quoting a lecture of Justice James Wilson, who participated actively in the Constitutional Convention). The

principle has been summarized as follows: "The basic constitutional principle of equal representation established by Art. I S 2 forbids and eliminates, so far as congressional representation is concerned, the consideration of any factor other than population." Preisler v. Secretary of State of Missouri, 257 F.Supp. 953, 973 (W.D.Mo. 1966) (decision of three judge court), Aff'd Kirkpatrick v. Preisler, 385 U.S. 450 (1967); cf. Davis v. Bandemer, 478 U.S. 109 (1986) (holding that the Fourteenth Amendment guarantees that a State, in dividing itself into geographical voting districts, may not identify voters of one political party with the intent and effect of diluting the vote of another party).

It cannot legitimately be disputed, therefore, that under the structure of the Constitution, the House

of Representatives is established to provide direct and equal representation of the people without any interfering agency on the part of the states. The states' role is limited to establishing the time, place and manner of elections (subject to federal supervision) and to providing the people with districts that assure direct and equal representation. The criteria to be applied by the states in discharging this responsibility can be based only on policies which secure the direct and equal representation of the people--not of legislators, interest groups, or perceived interests of the state as a whole--in order to assure representation without vote dilution for a particular interest. Accordingly, it must be conceded that the right of the people to elect directly their Representatives to the larger House of the federal legislature means nothing if

the Constitution does not forbid the states from manipulating the boundaries of congressional districts in attempts to influence the outcome of the people's congressional elections.

This said, one must ask what constitutionally permissible means are available to the states in carrying out their duty to designate representative districts which effectuate the right of their citizens to elect a delegation to the House. The starting point must be the proposition that the state legislatures, and consequently the district lines that they draw, should aim at minimizing the states' effect on the outcome of the election. The division must not focus on a particular classification of citizens in a way that "unnecessarily abridges" their vote. See Wesberry, 376 U.S. at 17-18 ("Our Constitution leaves no room for

classification of people in a way that unnecessarily abridges this right."). It is thus observed that in dividing its citizens into geographical districts, a state may not identify voters as rich, poor, democratic, republican, persons who voted for one candidate, or persons who are expected to vote for another. For to do so would constitute "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes"-- the classic definition of a gerrymander. See Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). Not only do such classifications interpose an improper interference by the state, an agency that was clearly intended to be excluded in the determination of House members, but more insidiously, the recognition and enhancement of one class

of people or voters necessarily dilutes the representation and vote of other classes not favored.

When we eliminate from consideration any classification of the people or of the voters for the purpose of favoring one class and diluting another, we are left with criteria for creating districts in a manner that is "neutral." Cf. Karcher, 462 U.S. at 759 ("[That] neutral decisionmakers developed the plan on the basis of neutral criteria" along with other facts, results in attachment of "a strong presumption of validity [to the redistricting plan].") (Stevens, J., concurring). While the possibilities are numerous, for whatever practical reasons may exist, the historical choice has been geological structures and long-standing boundaries, including state municipal and county subdivision

boundaries. It must be recognized from the start that even these criteria are not absolutely neutral. See Davis v. Bandemer, 478 U.S. at 129 (arguing that improper political intent in state redistricting should be easily proved because "[t]he reality is that districting inevitably has and is intended to have substantial political consequences" (quoting Gaffney, 412 U.S. at 753)). But to conclude that the nonexistence of totally neutral districting criteria means that no limits may be placed on any attempt by the States to alter the outcome of the election of the people's representatives in Congress is tantamount to concluding that the Article I debates at the Constitutional Convention had no meaning.

Concepts of compactness and contiguity and restrictions to

established geographical features have served, since the earliest decisions to divide the states into congressional districts, as constraints on the political will of state legislatures against the usurpation of the people's vote. See, e.g., Act of June 5, 1842, S 2, 5 Stat. 491 (1842); Karcher, 462 U.S. at 756 ("To some extent, geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation.") (Stevens, J., concurring); id. at 776 (arguing that departure from existing geographical and political boundaries leads to unlimited potential for deliberate partisan gerrymandering) (White, J., dissenting). While other constraints may prove to be "more neutral," these restrictions may at least be said to establish a "floor of neutrality" below which the states

cannot venture.

As a first principle in establishing district boundaries, then, a state legislature may make no classification of voters or of the people (except possibly to comply with the Fifteenth and the Voting Rights Act as hereafter noted), but instead must rely on available neutral criteria. Just as the numerosity requirement established by Kirkpatrick and Karcher is strictly enforced to prevent vote dilution caused by variances in population, so too must the prohibition against voter classifications.

The Fifteenth Amendment requires application of a second principle allowing limited consideration of race. The Great Compromise classified slaves for the purpose of measuring the relative representation of the States. See U.S. Const., art. I, S 2, cl. 3.

Even during the debates this was problematic and shortly thereafter Madison awkwardly sought to defend it. See The Federalist No. 54 (James Madison). The American Civil War, the adoption of the post-war Amendments, including particularly the Fifteenth Amendment, and the enactment of the Voting Rights Act of 1965, 42 U.S.C. S 1973 (1988), have attempted to correct that error. Today it is the law of the land that, before drawing any lines, we ensure that "the right of any citizen of the United States to vote [is neither abridged nor denied] on account of race or color." 42 U.S.C. S 1973 (1988); see Thornburg v. Gingles, 478 U.S. 30 (1986). This second principle, along with the strict equality of district populations also required by Article I, S 2, is a necessary overlay to any redistricting plan. Naturally, the

strict one-person, one-vote requirement can only be applied after the districting process is begun using neutral criteria. Otherwise, the required precision of the apportionment limitation would lead to an apparent justification for affecting the outcome of the people's election. See Wells v. Rockefeller, 394 U.S. 542, 551 (1969) (contending that a standard "of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort") (Harlan, J., dissenting).

Finally, any state legislative enactment that draws congressional district lines is subject, in theory, to the Equal Protection Clause of the Fourteenth Amendment. As a practical matter, however, the issue need not be reached in congressional redistricting cases because compliance by the state with the requirement of Article I to

provide direct and equal representation of the people in drawing district lines necessarily provides the people equal protection of the laws. Moreover, the standard for satisfying Article I is a stricter one then that for satisfying the Fourteenth Amendment. See Karcher, 462 U.S. at 732-33.

In summary, to comply with the Constitution and other federal law, a congressional redistricting plan undertaken by a state legislature must begin with neutral criteria, such as natural barriers or city and county lines, and then be modified to the extent necessary to achieve numerical equality of population within the districts. Finally, the state must check to ensure that the resulting districts comply with the Fifteenth Amendment and the applicable mandates of the Voting Rights Act.

II

Given the conclusion that Article I requires more than simple numerical equivalence of congressional districts, I would go beyond the fact finding efforts of the majority to consider whether the State used other than neutral criteria in devising its plan to divide Maryland into eight congressional districts. In doing so, it is appropriate to look first at the map which is the final product of the State's decisionmaking process. If the plan forms compact and contiguous districts which largely follow county, municipal, or identifiable geographic boundaries, then the court can presume, absent direct evidence to the contrary, that the districting plan is neutral. On the other hand, where the final plan includes shapes that look more like characters on a Saturday morning

television program than compact voting districts, the court should look behind the plan to question how the legislature arrived at its final decision.

A look at a map depicting the redistricting plan suggests that the State did apply neutral criteria in preserving intact the southern, eastern and western regions of Maryland. The district lines in these three regions follow county boundaries and geographic lines. In the center of the state, however, the convoluted shapes of the state's remaining five congressional districts call into question the neutrality of the plan. District 4, which lies predominately in Prince George's County, wanders across the county line into Montgomery County, from which it plucks about 159,000 persons. District 3, which was referred to on the floor of the House of Delegates as the

"splitting amoeba," darts in and out of the City of Baltimore, as it weaves its way through three other counties as well. District 1, which encompasses all of Maryland's eastern shore, leaps across the Chesapeake Bay into Anne Arundel County, rather than follow the contour of the bay and the state's northern border into Harford County. And District 2 finds its way from Baltimore County across the Patapsco River into Anne Arundel County to pick up 45,000 residents of Dundalk and vicinity.

The evidence in this case substantiates the suspicion that these districts were drawn to serve political interests, a fact conceded by the State at oral argument. In the northern portion the overriding concern of the state legislature was to accommodate the desires of U.S. Representative Bentley.

She both publicly and privately objected to the initial plan of the Governor's Advisory Committee and threatened to challenge it in court because the plan would have eliminated Bentley's 1990 district and paired her against U.S. Representative Gilchrist in District 1 on Maryland's eastern shore. In addition, Representative Bentley informed state Senator Pica, head of the Maryland Senate redistricting committee, of her desire for "a district she believed she could win [in] the next election." Ultimately she got what she wanted.

State Senator Miller, who served on both the Governor's Advisory Committee and the final conference committee, through that "it was particularly unfair to Congresswoman Helen Bentley to ask her to consider running on the Eastern Shore, especially

when her forte was the port of Baltimore, which is in the Dundalk, Essex region." In the final redistricting plan, Bentley's District 2 jumps the Patapsco River into Anne Arundel County to secure for her the port area. In addition, rather than extend District 1 from the eastern shore into Representative Bentley's district, the legislators attached a portion of Anne Arundel County to the eastern shore by way of the Chesapeake Bay Bridge.

There are no apparent geographic explanations for the unique configuration presented by District 3. Interestingly, according to Bentley's legislative director, U.S. Representative Cardin wanted portions of Baltimore City, Baltimore County, and Howard County, three of the four counties through which District 3 now snakes. Furthermore, the uneven

boundary between this district and that of Representative Bentley was apparently carefully drawn to allocate between the two districts particular politicians, including two state senators, a state delegate and a United States attorney.

A third cause of the curious division of the State's center was the clear desire to construct a district for Representative Hoyer, the fourth ranked Democratic member of the United States Congress. Senator Pica reported that there was a "prevailing feeling" in the General Assembly that the plan should assure Hoyer a "safe seat." This report was confirmed by a congressional aid who heard several state senators on the floor of the senate chamber discussing efforts to do so. The efforts were also much the subject of the press at the time. Hoyer expressed an interest in representing Prince George's County,

where he resides, as well as southern Maryland, where he maintains a vacation home.

The need to draw Representative Hoyer a "new" district arose from the perceived need to create a black-majority district in Prince George's County along the northeastern border of the District of Columbia. Hoyer's old district in Prince George's County would well have suited this requirement, but the legislators wanted to "guarantee" the election of a minority candidate and feared that Hoyer would lose if forced to run in a minority district. As the State explained,

> [An alternative plan], while creating a minority district, puts a white incumbent in the district. While this may have survived a legal challenge, this plan increases the probability that the State could

lose one of its most senior and powerful congressmen. The legislature was at liberty to decide that the possibility of losing Congressman Hoyer was detrimental to the entire state. This plan would also have made it more difficult for a minority to be elected from that district.

Overriding desires expressed at the public meeting in Hyattsville, the legislators thus carved the county into two districts. The minority district, District 4, winds through Prince George's County (conveniently avoiding the residence of Mr. Hoyer) and into southeastern Montgomery County. Consonant with Hoyer's wishes, District 5 includes the remainder of Prince George's County and all of Southern Maryland.

Ironically, when questioned

whether a "new white-majority district" should be created for Hoyer, seventy per cent of the Prince George's County voters polled responded "No." Statewide, sixty-five per cent also responded "no." When made aware of these results, however, Senator Pica replied, "[K]nowing Congressman Hoyer's position in the House of Representatives, I would still try to reserve that status in Congress."

Creating a minority district in which Hoyer would not run prompted the legislators to allocate the remaining seven districts among the eight incumbent representatives. The final placement of the district boundaries in the center of the State was determined by the decision to eliminate Representative McMillan's former district and pit him, not against Bentley, Hoyer or Cardin, but against

the junior Republican Representative, Wayne Gilchrist, of District 1. Indeed, the precinct in which McMillan resides is the only one in the Crofton area which was included in that portion of Anne Arundel County that was swept across the bay into District 1.

In light of this evidence I find that the State did not use neutral criteria to establish its eight congressional districts. Instead, the driving force behind the placement of the new district boundaries was a desire to promote the election bids of certain incumbent representatives at the expense of other, less senior incumbents. The Constitution gives to the voters of Maryland a right to make their own choices about reelecting their present Congressmen to represent them against in Congress. The State's attempts to defeat that right by manipulating

district line, either by unnecessarily pitting incumbents against one another or by enhancing the prospects of one candidate over another, cannot be reconciled with Article I, S 2, and Wesberry.

I therefore conclude that Maryland's 1991 congressional redistricting plan as contained in H.B. 10 violates the mandate of Article 1, S 2, that such plans provide direct and equal representation to the people, and, accordingly, I would not permit an election to proceed on the basis of H.B. 10.

For the foregoing reasons, I respectfully dissent.

Map of Central Maryland Showing
Congressional Districts Adopted in H.B. 10
(October 22, 1991)

APPENDIX B

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, et al.	)	
Plaintiffs	)	CIVIL ACTION NO.
vs.	)	S91-3200
THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, et al.	)	
Defendants	)	

* * * * * *

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Anne Arundel County Republican Central Committee, et al., Plaintiffs above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the three-judge district court, entered in this action

This appeal is taken pursuant to 28 U.S.C. Section 1253.

/S/ John R. Greiber, Jr.
JOHN R. GREIBER, JR.
Attorney for Plaintiffs
166 West Street
P.O. Box 1747
Annapolis, MD 21404

(401)268-1121

(No. 07134)

I HEREBY CERTIFY that on this _____ day of _____, 1992, a copy of the aforegoing was hand-delivered to Evelyn O. Cannon, Esq., Assistant Attorney General, 20th Floor, 200 St. Paul Place, Baltimore, MD 21202 and to James C. Praley, The State Administrative Board of Election Laws, P.O. Box 231, Annapolis, Maryland 21404.

/S/ John R. Greiber, Jr.
JOHN R. GREIBER, JR.
(No. 07134)

APPENDIX C

AFFIDAVIT
OF
DELEGATE
JOHN G. GARY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, et al.	)	
Plaintiffs	)	CIVIL ACTION NO. S91-3200
vs.	)	
THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, et al.	)	
Defendants	)	

* * * * * *

AFFIDAVIT

I, Delegate John G. Gary, hereby declare that:

1. That I am over eighteen years of age and competent to testify.

2. That I am a resident of Anne Arundel County, Maryland.

3. That I am a Delegate of the Maryland General Assembly.

4. On October 22, 1991, the House of Delegates was convened at approximately 2:00 P.M.

Speaker Mitchell placed H.B. 10, which had been amended in the Senate, on the floor for debate.

Delegate Nancy Koop, who was the Chairman of the Conference Committee, attempted to explain the bill.

Delegate Busch requested a 30-minute recess so that we could review the new plan in detail.

Speaker Mitchell denied the motion.

Delegate Busch directed question to Delegate Kopp regarding which precincts were in which districts.

Delegate Kopp referred to the actual bill (H.B.10), but was unable to answer the question by Delegate Busch.

Speaker Mitchell realized that

Delegate Kopp could not answer the question, thus he recessed the House for 30 minutes.

The Anne Arundel County Delegation met with Karl Aro (Chief Advisor for Legislative redistricting in Legislative Services) and Susanne Brogan (Legislative Aide to the Speaker), there were several reporters present which listened to our conversation, in the Press Room behind the Chambers.

I asked Ms. Brogan why Gibson Island, Pasadena, and Lake Shore were removed from District 1 and placed in District 2, and why parts of Baltimore City (Curtis Bay) was placed in District 1.

Ms. Brogan's reply, quoting as closely as possible, "You are not going to like my answer, but it simply was done to give Tom McMillan more Democrats in his new District ... We took some Republicans out of District 1 and put

them in Helen Bentley's District, so that District 1 would have more Democrats ..."

I asked her - "You mean it was done simply to give Tom more Democrats so that he would have a better chance against Gilcrest?"

Ms. Brogan replied - "That's right, it was purely political ... after all we were cutting up his District (McMillan's)... We had to do something to satisfy him.

I asked Karl Aro - "Is that true? Was this done simply to make the numbers work?"

He replied - "Yes, we had to get the numbers close numerically ... so we included Curtis Bay because it is heavily Democratic."

I said - "You're kidding me?"

He replied: "No... that's why it was done. Don't shoot me, I only work the

numbers ... that's what I was told to do."

I again questioned Ms. Brogan: "How are Gibson Island and Lake Shore connected to the Second District?"

She replied: "We don't consider the water as separating the District."

and Karl said: "That's right the water is not a consideration..."

I then said, "But these aren't even connected by a bridge ... you would have to go by boat or drive 30 minutes through two other congressional districts?"

and Karl replied: "That's right ... but it is allowable. We don't have to consider a body of water as a separation ... as long as the numbers are correct and they can be fairly represented."

I ended the conversation by saying, "I don't believe that!"

Later, on the floor of the House

(during debate) when I asked the same question of Delegate Kopp, concerning the separation of the district, she gave me the exact same answer as Karl Aro and Ms. Brogan.

I, hereby declare, under penalty of perjury that the foregoing is true and correct.

/S/ John G. Gary
JOHN G. GARY
Delegate

SUBSCRIBED AND SWORN to this ____ day of December, 1991, before me, a Notary Public in the State of Maryland.

My Commission Expires: _____

_____
Notary Pubic